SUPREME COURT, U. S.

JUL 28 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 431

CONTINENTAL CASUALTY COMPANY,

Petitioner,

v.

JACOB JOHN PFEIFER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

WILLIAM A. MANN
308 Colorado Building
1341 G Street, N. W.
Washington, D. C. 20005
Counsel for Petitioner

Washington, D. C. - THIEL PRESS - 202 - 269-6025

TABLE OF CONTENTS

OPINIONS BELOW 1
JURISDICTION 2
HOW FEDERAL QUESTIONS ARE PRESENTED 2
QUESTIONS PRESENTED 2
STATUTES INVOLVED 3
STATEMENT 3
REASONS FOR GRANTING THE WRIT 7
1. There was an absence of evidence to support the judgment below and this constituted a denial to the petitioner of due process of law 7
2. The course and conduct of the trial below deprived petitioner of property without due process of law 12
3. The course and conduct of the trial below and the judgment of the Court of Appeals of Maryland denied to the petitioner the equal protection of the laws 13
4. The judgment below is in violation of the Maryland Constitution Declaration of Rights, Article 23, dealing with due process of law 15
5. The Court below applied principles of law and evidence having the effect of impairing the obligations of contract in violation of Article One, Section 10, of the Constitution of the United States 16
CONCLUSION 17
APPENDIX A – Opinion of the Court of Appeals of Maryland 19
APPENDIX B – Order of the Circuit Court for Prince George's County, Maryland 29
APPENDIX C – Constitution of Maryland, Article 23 30

CITATIONS

CASES

American Federation of Labor v. Swing (1941), 312 U.S. 715, 85 L.Ed. 855, 61 S. Ct. 468, *rehearing denied*, 312 U.S. 715, 85 L. Ed. 1145, 61 S. Ct. 735 11

Bell v. Hood (1946), 327 U.S. 678, 90 L. Ed. 939, 66 S. Ct. 773 14

Betts v. Brady (1942), 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252 12

Blackburn v. Alabama (1960), 361 U.S. 199, 4 L. Ed. 2d 242, 80 S. Ct. 274 11

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 74 L. Ed. 1107, 50 S. Ct. 451 12

Bright v. State (1944), 38 A.2d 96, 183 Md. 308 15

Carozza v. Federal Finance and Credit Co. (1925), 131 A. 332, 169 Md. 223 14

Chicago L. Ins. Co. v. Cherry, 244 U.S. 25, 61 L. Ed. 966, 37 S. Ct. 492 12

Douglas Park Jockey Club v. Grainger (1906 CC Ky.), 146 F. 414, *rev'd on other grounds*, 148 F. 513 (C.A. 6th) 11

Harvard Sports Daily v. Weller (1941), 18 A.2d 210, 179 Md. 355 13

Nationwide Mut. Ins. Co. v. McBriety, 230 A.2d 81 14

Re Trusteeship of Kenan, 99 A.L.R.2d 934, 261 N.C. 1, 134 S.E.2d 85 13

Slansky v. State (1949), 63 A.2d 599, 192 Md. 94 15

Thompson v. Louisville (1960), 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 ..... 11, 12

STATUTES

Article 1, Section 10, Constitution of the United States 3, 16

Maryland Constitution Declaration of Rights, Art. 23 ..... 2, 3, 15

Maryland Code (1964 Replacement Volume 5), Art. 48A, sec. 374 3

TEXT

Corpus Juris Secundum, Constitutional Law sec. 575 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

CONTINENTAL CASUALTY COMPANY,

Petitioner,

v.

JACOB JOHN PFEIFER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above-entitled case on May 13, 1967.

OPINIONS BELOW

The opinion of the Circuit Court for Prince George's County, Maryland is unreported and is printed in appendix B hereto, *infra* p. 29. The opinion of the Court of Appeals

of Maryland, printed in appendix A hereto, *infra* p. 19, is reported at __ Md. __, 229 A.2d 422.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on May 11, 1967 (R. 1). Timely motion for reargument was denied on June 13, 1967. (R. 15) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3), since it is contended that the action of the State Court is in violation of the due process and equal protection clause of the Fourteenth Amendment as well as Article 1, § 10 of the Constitution of the United States.

HOW FEDERAL QUESTIONS ARE PRESENTED

The federal questions as to the denial of due process and judicial impairment of contract were raised in the motion for reargument filed in the Court of Appeals of Maryland on June 13, 1967. (R. 15) The federal question of violation of the equal protection clause is raised herein for the first time. The decision of the highest State Court, *infra* p. 19, affirming the lower Court, was completely unexpected and unanticipated.

QUESTIONS PRESENTED

1. Whether there was such absence of evidence to support the judgment below as to constitute a denial to the petitioner of due process of law.

2. Whether the course and conduct of the trial below deprived petitioner of property without due process of law.

3. Whether the course and conduct of the trial below and the judgment of the Court of Appeals of Maryland denied to petitioner the equal protection of the laws.

4. Whether the judgment below is in violation of the Maryland Constitution Declaration of Rights, Article 23, dealing with due process, impairment of the obligations of contract and equal protection.

5. Whether the Court below applied principles of law and

evidence having the effect of impairing the obligations of contract in violation of Article 1, § 10 of the Constitution of the United States.

STATUTES INVOLVED

The pertinent statutory provisions involved are the Maryland Code (1964 Replacement Volume 5) Article 48A, § 374 —relevant portions of which are printed as part of the Court of Appeals of Maryland opinion, pages 25-26, *infra*—and the Maryland Constitution Declaration of Rights, Article 23, Appendix C, *infra* p. 30.

STATEMENT

Dr. Jacob John Pfeifer, respondent, filed a declaration on October 18, 1965 in the Circuit Court for Prince George's County, Maryland seeking a declaratory judgment and alleging that on May 26, 1963, he sustained an injury to his right hand, which injury constituted a total disability and was permanent in nature, thus entitling him to receive $750 per month beginning May 26, 1964 under the provisions of Petitioner's Group Policy and Certificate (E. 5)*

On November 30, 1965, petitioner filed a plea denying the allegations of the respondent's declaration (E. 1). The basis of the denial was that the respondent was ineligible for coverage in accordance with the terms of the insurance contract and additionally that he had made material false representation in his contract application in that he was suffering from a Colles' fracture of the left wrist at the time he signed the application; his wrist was in a cast; he was taking codeine for pain; he was drawing disability compensation, etc.

At the trial on May 10, 1966, the seventy-seven year old respondent testified (E. 21-44). The respondent introduced the petitioner's group insurance policy (E. 98), and respondent's attorney read into evidence certain portions of the pol-

*Designation "E." refers to pages of joint record extract in Court of Appeals of Maryland.

icy pertaining to "Eligible Members" (E. 27) showing that by the terms of the insurance contract, applicants were not eligible if they were temporarily unemployed or temporarily absent from the full-time duties of their occupation by reason of sickness or injury.

On cross-examination and recross of respondent (E. 45-60, 65), he admitted that on January 29, 1963, the date he signed the application for insurance coverage (E. 182-183), which he knew to be a part of the insurance contract (E. 57), he had answered "yes" to questions on the insurance application as follows:

> "No. 3 Are you now to the best of your knowledge and belief in good health and free from any physical impairment?
>
> "No. 5 Are you now actively engaged in your occupation on a full-time basis?" (E. 50)

Cross-examination of respondent (plaintiff below) showed that respondent had broken his left wrist, a Colles' fracture, on December 31, 1962 (E. 48), some twenty-nine days before he signed the insurance contract applications on January 29, 1963; that he was operated on under general anesthesia for the fracture and a cast placed thereon (E. 48-49); that at the time of his signing the insurance application he was carried on the rolls of the U. S. Public Health Service as "not fit for duty" and that on April 1, 1963, two months after the date of the insurance application, he was receiving codeine for pain (E. 54, 187); additionally the cross-examination of respondent indicated that he was:

1. Retired from the Veterans Administration as a medical doctor on December 14, 1954 (E. 45).

2. Drawing disability compensation at time of trial from the Veterans Administration and had been drawing it since 1946-47 (E. 45).

3. Suffering from a physical impairment in that one leg was an inch and one-quarter shorter than the other (E. 46-47).

4. Not engaged in the practice of medicine in Maryland and had no office there in his home or elsewhere (E. 47).

5. Not under any contract for future employment with anyone or any company at the time he signed the insurance contract application (E. 47).

6. The person under the care of Doctor Bertram Weisbaum whose report indicated that respondent was not fit for duty on March 28, 1963 and that the said doctor made an entry on his record on March 5, 1963 as follows:

> "Patient is now two months post left Colles' fracture. He has been having difficulty with persistent aching in the dorsum of the wrist. Examination reveals marked limitation of flection and extension of the wrist. Internal rotation is fairly good; however, external rotation is markedly limited. The patient is also noted to have stiffness of the fingers with limited flection, so that the finger tips can reach only within approximately three-quarters inch of the palm. There appears to be some diffuse atrophy of the hand as well, probably from disuse. The patient is not fit for duty. He is referred to the Washington Public Health Service Out-patient Clinic for physical therapy—whirlpool, paraffin baths and active exercises. He is to return on March 28, 1963." (E. 55)

7. Aware that he was disabled at the time he signed the insurance application but did not think it made any difference (E. 65).

The above evidence is uncontradicted except by the respondent's own testimony that he did not think it important.

Respondent's medical witness testified that a Colles' fracture of the left wrist sustained by respondent on December 31, 1962, and for which he was still under treatment when he signed the insurance application on January 29, 1963, was considered a serious fracture (E. 71).

At the close of respondent's case (plaintiff below), petitioner moved for a directed verdict (E. 9-15, 78). Motion

was denied by the trial court. Petitioner then introduced contract application and medical records not introduced by respondent (E. 182, 290), and renewed motion for a directed verdict (E. 79), which was denied.

Special issues submitted by petitioner to the Court were denied by the Judge in chambers. The Judge prepared special issues which were given to the jury (E. 80-84), including the following:

> ". . . if a person answers a question on an application for an insurance policy, and he is not acting in bad faith—if he answers that incorrectly and not acting in bad faith and doesn't intend to deceive, and doesn't think it's of any importance and doesn't think the answer makes any difference and he doesn't know or have reason to believe that that would make any difference in the insurance company assuming the risk and writing the policy, then that falls into a different category legally than someone who deliberately makes it with the idea of deceiving the insurance company so they will write the policy and assume the risk which they otherwise would not assume for the amount of the premium they are getting if they knew about this particular fact" (E. 84).

The jury answered the special issues and were discharged (E. 86-87). On May 10, 1966, judgment was entered in favor of the respondent in the amount of Eighteen Thousand, Two Hundred, Thirty-nine ($18,239.00) Dollars, with interest from May 10, 1966 and declaratory judgment in accordance with the order of May 13, 1966. Judgment absolute was entered May 13, 1966 (Appendix B, page 29, *infra.)*

Petitioner appealed to the Court of Appeals of Maryland on May 16, 1966.

Briefs were filed and oral argument heard before the Court of Appeals of Maryland, on April 13, 1967. On May 11, 1967, the Court of Appeals affirmed the judgment and order of the Circuit Court (Appendix A, page 19, *infra*). On June 9, 1967, petitioner filed motion for reargument (R. 15). On

June 13, 1967, motion for reargument was denied and the opinion modified (R. 1, 15). This petition follows.

REASONS FOR GRANTING THE WRIT

1. There was an absence of evidence to support the judgment below and this constituted a denial to the petitioner of due process of law.

There are two major contentions of the petitioner. First, the uncontroverted evidence establishes beyond question that the respondent was, by the terms of the insurance contract itself, clearly ineligible for the coverage by the terms of the insurance contract because he was temporarily unemployed or temporarily absent from the full time duties of his occupation for reasons of sickness or injury (E. 27). The evidence shows that this fact was established, without contradiction, by the medical records, respondent's own testimony, and that of his medical witness (E. 45-49, 55, 71). There is no evidence to support the view that respondent could have been within the terms of the insurance policy contract which was received by him prior to his answering the questions on the application for insurance. The second major contention of the petitioner is that the uncontroverted evidence establishes the falsity and materiality of respondent's answer to question three of the insurance contract application (E. 45-50, 54, 57, 65, 71, 121). There is no evidence tending to show that the respondent did not give a false answer on the application for insurance to a question that was material to the issuance of a contract of insurance.

The evidence supporting these two major contentions of the petitioner that the respondent was ineligible for the coverage requested and gave false and material answers in his insurance contract application is summarized together as follows:

(a) The insurance contract states with regard to "eligible members":

"Eligible members wherever used in this policy means a member who is not a full-time member of the armed services of any country, *who is not retired* and who is *actively performing the full-time duties of his occupation.* Provided that a Member who is temporarily unemployed or temporarily absent from the full-time duties of his occupation for *reasons other than sickness or injury* shall nevertheless be deemed to be actively performing the full-time duties of his occupation." (emphasis supplied) (E. 99)

It is submitted that there is no question but that an applicant who was temporarily absent from the full-time duties of his occupation by reason of sickness or injury, was clearly ineligible.

(b) Questions 3 and 5 of the insurance application, both answered by the respondent in the affirmative, are as follows:

3. Are you now to the best of your knowledge and belief in good health and free from any physical impairment?

5. Are you now actively engaged in your occupation on a full-time basis?

(c) The respondent, Jacob John Pfeifer, testified as follows: that he had fallen on the ice outside his home on December 31, 1962 and had sustained a broken left wrist, referred to as a colle's fracture, for which he was hospitalized, given general anesthesia, and a cast was applied; that he was under treatment at the time he signed the insurance contract application on January 29, 1963 (E. 48-50); that he had retired from the Veterans Administration on December 14, 1954 (E. 45); that he was drawing disability compensation at the time of trial and had been since 1946-47 (R. 45); that he was suffering from a physical impairment in that one leg was an inch and one-quarter shorter than the other for which he wore built up shoes (E. 46-47); that he was not engaged in the practice of medicine in Maryland

and had no office in his home or elsewhere (E. 47); that he was not under contract for any future employment with anyone or any company at the time he signed the insurance application (E. 47); that he was the person who signed the insurance application on January 29, 1963 stating that that he was, at that time, actively engaged in his occupation on a full-time basis and that he was in good health and free from any physical impairment or disease (E. 50); that he was the person under the care of Doctor Bertram Weisbaum whose report indicated that he was still not fit for duty on March 28, 1963 and that this Doctor made an entry in his record on March 5, 1963 as follows:

> "Patient is now two months post left colle's fracture. He has been having difficulty with persistent aching in the dorsum of the wrist. Examination reveals marked limitation of flection and extension of the wrist. Internal rotation is fairly good; however, external rotation is markedly limited. The patient is also noted to have stiffness of the fingers with limited flections, so that the finger tips can reach only within approximately three-quarters inch of the palm. There appears to be some diffuse atrophy of the hand as well, probably from disuse. The patient is not fit for duty. He is referred to the Washington Public Health Service Out-Patient Clinic for physical therapy—whirlpool, paraffin baths and active exercises. He is to return on March 28, 1963" (E. 55);

that he (respondent) was aware that the insurance application he signed on January 29, 1963 was a part of the insurance contract (E. 57); and that he was aware that he was disabled at the time he signed the insurance application, though he claimed on the witness stand that at that time he did not think it made any difference that he gave an answer that falsely represented his true physical condition (E. 65).

None of the foregoing evidence was contradicted in any manner. On the contrary, the respondent's own medical witness testified that a colle's fracture of the left wrist such as that sustained by respondent was a serious one (E. 71).

How was this evidence reflected in the opinion of the Court of Appeals of Maryland? (Appendix A, *infra*) On page 2 of the opinion, the Court quoted the definition of "eligible member" and thereafter ignored it.

As to the falsity of the answer given by the respondent on the contract application that he was, at the time, in good health and free from any physical impairment, the opinion of the Court of Appeals stated, Appendix A, *infra*, that at the trial the respondent stated that he did not mention the fractured left wrist because some brochure material had led him to believe that it was not necessary and because the left wrist was healing so rapidly. The source of the Court's statement that the wrist was healing so rapidly is not apparent from the record, in view of the entry by Doctor Weisbaum (quoted at p. 9, *supra*) over two months after the respondent broke his left wrist.

The Court of Appeals stated, Appendix A, *infra*, that there was absolutely no evidence that the respondent had permanently withdrawn from his full-time occupation as a ship's doctor. The petitioner disputes this statement but states that regardless, it is of absolutely no significance. The respondent's being not fit for duty on January 29, 1963 and for over three months following the fracture on December 31, 1962 made him clearly ineligible according to the insurance contract. Giving the language of the insurance contract (E. 99) its normal meaning, the respondent was temporarily unable to perform the full-time duties of his occupation by reason of sickness or injury and was thus ineligible for the coverage. The medical records clearly indicate respondent was still unfit for duty almost three months after he signed the application (E. 186-187).

The Court of Appeals states, Appendix A, *infra*, that other than some exhibits and cross-examination of another medical expert, "there was no evidence to support the claim of the insurer that the representation was false and material to the risk." On the basis of the evidence previously summarized, it is submitted that this part of the opinion is not supported by any evidence.

Petitioner submits that a sentence of guilty in a criminal trial, where there was such a total absence of evidence, would be summarily reversed by any reviewing authority.

Although a criminal case, the rule that "no evidence" violates due process was clearly stated by this Court in the case of *Thompson v. Louisville* (1960), 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624. It is submitted that the requirement of due process is, fundamentally, a rule of fairness and the Fourteenth Amendment forbids fundamental unfairness in the use of evidence. *Blackburn v. Alabama* (1960), 361 U.S. 199, 4 L. Ed. 2d 242, 80 S. Ct. 274.

The right to make legal contract of all kinds, without fraud or deception, is both a liberty and a property right within the protection of the Constitutional guaranties against the taking of liberty or property without due process of law. CJS, *Constitutional Law* § 575.

As Professor Warren Seavey said on one occasion when discussing an obviously erroneous decision, there is no explanation for the decision except that the defendant was an insurance company.

It is agreed that mere lack of success in the State courts, does not, alone, show that there has been a violation of the due process guaranty of the Constitution of the United States. However, when the State Court denies to any citizen the equal protection of the law or deprives him of his property without due process of law, the State itself does so and such action comes within the constitutional provision. *Douglas Park Jockey Club v. Grainger* (1906 CC Ky.), 146 F. 414, *rev'd on other grounds* (C.A. 6th), 148 F. 513.

As a matter of substantive constitutional law, there is no doubt that a state court judgment constitutes "state action" within the purview of the due process clause of the Fourteenth Amendment and that such a judgment may, depending upon the circumstances, deprive a litigant of property without due process of law. *American Federation of Labor v. Swing* (1941), 312 U.S. 715, 85 L. Ed. 855, 61 S. Ct.

568, *rehearing denied*, 312 U.S. 715, 85 L. Ed. 1145, 61 S. Ct. 735.

As this Court has stated, an asserted denial of due process of law is to be tested by an appraisal of the totality of facts in a given case. *Betts v. Brady* (1942), 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252.

Since there was no evidence to support the judgment of the Court, it is submitted that this amounted to a denial of due process as was clearly stated by this Court in *Thompson v. Louisville*, *supra*.

It has been stated that whenever a wrong judgment is entered against a defendant, his property is taken when it should not have been; but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights, *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 74 L. Ed. 1107, 50 S. Ct. 451; *Chicago L. Ins. Co. v. Cherry*, 244 U.S. 25, 61 L. Ed. 966, 37 S. Ct. 492. It is submitted that the decision of the court in this case is so arbitrary and capricious in the face of no evidence, as to amount to a denial of due process of law.

2. The course and conduct of the trial below deprived petitioner of property without due process of law.

It is submitted that due process of law requires adherence to the adopted and recognized rules of evidence in civil as well as criminal trial and certainly the course and conduct of the procedural aspects of a trial are subject to the requirement of due process. The evidence has already been summarized. The respondent testified that the reason he gave untrue answers on the insurance application was that he did not consider it important (E. 65).

The respondent was the plaintiff below. In the face of all of the evidence, the trial court denied petitioner's motions for a directed verdict at the close of plaintiff's case as well

as at the close of defendant's case. The trial judge in instructing the jury stated, in effect, that even if the answers given were false, they could disregard it as it had no legal significance if they believed the respondent medical doctor did not consider them important (E. 83-84).

The Court of Appeals of Maryland stated in their opinion, Appendix A, *infra*, that the petitioner had introduced no evidence to support their claim that respondent's representation was false or material to the risk other than for some exhibits and the testimony on cross-examination of another medical expert. The materiality of the clearly false representation, by the respondent, on the insurance application, is established by the fact that the policy stated that those persons, even temporarily unemployed or absent from their occupation for reasons of sickness or injury, were ineligible for coverage. The respondent-plaintiff had some burden once the evidence showed that he was clearly ineligible by the terms of the insurance contract and that, by his own admission, he had given false answers on the insurance contract application. The respondent-plaintiff evaded any consequences of his admissions by the mere expedient of saying he did not consider the answers he gave in his own handwriting, as of any importance and the trial court, as well as the Court of Appeals, supported him. The results amounted, it is submitted, to the confiscation of petitioner's property without due process of law. The opinion was harsh, oppressive and discriminatory.

3. The course and conduct of the trial below and the judgment of the Court of Appeals of Maryland denied to the petitioner the equal protection of the laws.

As was held in the case of *Re Trusteeship of Kenan*, 99 A.L.R.2d 934, 261 N.C. 1, 134 S.E.2d 85, the Fourteenth Amendment prohibition against the denial to any person within the jurisdiction of the state of the equal protection of the laws is not confined to the Legislature, but is applicable to Courts. *Harvard Sports Daily v. Weller* (1941), 18 A.2d 210, 179 Md. 355.

A private corporation is a "person" within the meaning of the equal protection clause of the Fourteenth Amendment to the Federal Constitution and is entitled to the equal protection of the laws. *Carozza v. Federal Finance and Credit Co.* (1925), 131 A. 332, 169 Md. 223.

The crux of this case is that by the admission of the respondent, he was clearly not eligible for membership and coverage according to the definition of eligible member in the policy because he was temporarily absent from the full-time duties of his occupation for reasons of sickness or injury. Though completely ignored by the trial court and the Court of Appeals, this was clearly and unequivocally established by all of the evidence. There was not one shred of evidence to refute it in any way. This was not a question of fact in dispute. It was undisputed. This was, it is submitted, not an immaterial or unsubstantial issue, but rather was the key issue in the case. As this Court stated in *Bell v. Hood* (1946), 327 U.S. 678, 90 L. Ed. 939, 66 S. Ct. 773, where the alleged violations of the Constitution pleaded were not immaterial and unsubstantial, but rather formed the sole basis of the relief sought, it could not sustain a dismissal of the cause for want of jurisdiction.

As to the second point, relating to the false representations of respondent on the contract application, substantial, though not as significant as the uncontroverted evidence as to lack of eligibility, Maryland cases uniformly hold that *when bad faith or falsity or materiality is shown by clear and convincing or uncontradicted evidence, the question as to whether a representation is true or false or material to the risk is one for the trial court to decide as a matter of law.* (emphasis supplied) Maryland cases in support of this proposition are contained in the opinion of the Court of Appeals of Maryland, Appendix B, *infra.* In the recent 1967 Maryland case of *Nationwide Mut. Ins. Co. v. McBriety*, 230 A.2d 81, the Court held that material misrepresentation by applicant for life insurance, in reliance upon which policy is issued, voids the policy, *regardless of whether misrepresen-*

tation was made intentionally or through mistake and in good faith, because it results in assumption by insurer of a risk different from that which applicant led it to suppose it was assuming.

The failure of the court to consider the undisputed evidence previously summarized, it is submitted, constituted a denial of equal protection of the laws to the petitioner.

4. The judgment below is in violation of the Maryland Constitution Declaration of Rights, Article 23, dealing with due process of law.

The insurance contract clearly stated that a person is ineligible for coverage if at the time he signs the application he is temporarily absent from the full-time duties of his profession for reasons of sickness or injury (E. 99). The evidence was overwhelming and uncontradicted that the respondent was carried on the rolls of the Public Health Service as "not fit for duty" for over two months after he signed the insurance application (E. 186-87). His considerable difficulties and pain were fully recorded by his Doctor Weisbaum on March 5, 1963 (E. 55). This evidence was completely ignored by the trial court and although the definition of "eligible member" was noted by the Court of Appeals in their opinion, Appendix A, *infra*; they likewise failed to consider it thereafter.

Due process of law requires essential fairness and justice in judicial proceedings. *Slansky v. State* (1949), 63 A.2d 599, 192 Md. 94. It is submitted that if "due process" is a rule of fairness, it was violated in every essential in the courts below. As the Maryland court stated in *Bright v. State* (1944), 38 A.2d 96, 183 Md. 308, the object of the Federal and State Constitutional Provision with respect to due process of law is to declare and secure to people their pre-existing rights as established by usage and the settled course of law.

Article One, Section 10, of the Constitution of the United States provides that no state shall pass any law impairing

the obligations of contract and *the Courts cannot apply principles which would have the effect of impairing a contract.* (emphasis supplied) *Watkins v. Worthington* (1830), 2 Bland 509.

The Court below, in failing to consider the uncontroverted evidence as to respondent's ineligibility as well as the false and material representations admitted by the respondent, applied principles in violation of the Federal Constitution as well as that of the State of Maryland.

5. The Court below applied principles of law and evidence having the effect of impairing the obligations of contract in violation of Article One, Section 10, of the Constitution of the United States.

There was no ambiguity shown in the terms of the contract of insurance. The definition of "eligible member" in the policy was quoted without comment by the Court of Appeals of Maryland in their opinion, Appendix A, *infra.* The evidence was not controverted that by the terms of the contract a person temporarily absent from full-time employment in his profession for reasons of sickness or injury was ineligible for coverage. The evidence was likewise overwhelming that the respondent, when he signed the contract application on January 29, 1963, was not fit for duty then and for some two months thereafter. Additionally, by his own admission, he had no office or contract for any future employment.

The Court of Appeals ignored all of the evidence and stated "the court could have directed a verdict in favor of the insured under Plan C . . .". Appendix A, *infra.* The petitioner, in the upper left hand corner of the application, states "The Company reserves the right to limit impaired risks to the benefits obtainable under Plan C in table at right." (E. 96) However, this coverage was only available in the event the applicant was eligible. Here all of the evidence was that he was ineligible. Obviously, the Court of

Appeals considered a contract that might have been entered into between respondent and petitioner, had he been eligible, but was not.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari to the Court of Appeals of Maryland be granted.

Respectfully submitted,

WILLIAM A. MANN
308 Colorado Building
1341 G Street, N. W.
Washington, D. C. 20005
Counsel for Petitioner